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No. 90-1863

In The

Supreme Court of the United States

October Term, 1991

WALKER L. CHANDLER and CAROLE ANN RAND,

Petitioners,

vs.

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

BRIEF OF GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION AND OTHER STATE RESPONDENTS IN OPPOSITION

MICHAEL J. BOWERS
Attorney General of Georgia

MICHAEL E. HOBBS
Deputy Attorney General
State of Georgia

Please Serve:
MICHAEL E. HOBBS
Deputy Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 651-9451

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly found a state operated television broadcaster may air political debates only between the major party candidates to the exclusion of all others, since the broadcast activity does not constitute a public forum and does not operate as a pure marketplace of ideas?

2. Whether the Court of Appeals correctly found no denial of equal protection in a public broadcaster's decision not to invite Libertarian Party candidates to participate in televised political debates where such candidates are not members of a protected class and the decision was a rational exercise of broadcasting judgment?

3. Whether the issues raised by Petitioners' Complaint have become moot since the subject debates have already occurred?

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STATEMENT OF THE CASE

The Georgia Public Telecommunications Commission [hereinafter referred to as GPTC] is an instrumentality of the State of Georgia and is a public corporation. O.C.G.A. § 20-13-1(a). GPTC was created, in part, "for the purpose of providing educational, instructional, and public broadcasting services to the citizens of the State of Georgia." O.C.G.A. § 20-13-5(a). In performing its statutory functions GPTC is authorized and does hold licenses issued by the Federal Communications Commission. O.C.G.A. § 20-13-8(a)(1).

As a part of its scheduled programming, GPTC planned to televise debates between the Republican and Democratic candidates for Lieutenant Governor and Governor on November 2 and November 4, 1990, respectively. The November 4, 1990, gubernatorial debate was organized and sponsored by the Atlanta Journal and Constitution, whereas the debate for the lieutenant gubernatorial candidates was organized entirely by GPTC. Only the major party candidates were invited to participate in the debates. Petitioner Chandler, as the Libertarian candidate for Lieutenant Governor, requested that he be permitted to participate in the debate. GPTC, through its director, Dr. Richard Ottinger, denied Chandler's request, but offered time to both Chandler and Petitioner Carole Ann Rand, the Libertarian gubernatorial candidate, providing them an opportunity to appear on a separate televised program without opposition from the other candidates. Petitioners initially declined Dr. Ottinger's offer.

On September 17, 1990, Chandler sued GPTC in the United States District Court for the Northern District of

Georgia, seeking declaratory and injunctive relief and alleging that GPTC's decision not to invite him to participate in the debates violated the First Amendment and the Equal Protection clause of the Fourteenth Amendment. Chandler further alleged that GPTC's failure to invite Carole Ann Rand to participate in the gubernatorial debate constituted sex discrimination. On September 28, 1990, Carole Ann Rand sought and was permitted by the District Court to intervene as a party Plaintiff.

On October 3, 1990, GPTC moved to dismiss the complaint, asserting its immunity under the Eleventh Amendment, and further asserting that, as a licensee, the claims of Petitioners were matters within the exclusive jurisdiction of the FCC. Finally, GPTC asserted that the complaint failed to state a claim since neither the First Amendment nor the Fourteenth Amendment guaranteed political candidates access to television broadcasts by FCC licensees.

Subsequently, the District Court directed Petitioners to file an amended complaint adding the individual defendants who are all members and officers of the Georgia Public Telecommunications Commission.

On October 18, 1990, the District Court conducted an evidentiary hearing on the pending motions, and heard the testimony of Dr. Ottinger. Dr. Ottinger testified that it was the judgment of GPTC that a debate between the two major party candidates would be of more interest and more newsworthy in the absence of a third minority party participant. He further testified that his decision was not that the Libertarian Party viewpoint was of no interest to

the public, but rather that the debate would be more effective as a face off between the major party candidates.

The District Court concluded that the failure to include ballot-qualified candidates in GPTC's debate constituted viewpoint-based discrimination in violation of the First Amendment, citing *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985). Appendix at A-52. However, the District Court did state that it would not find a general right of access to the broadcast media.

In addition, the District Court found a denial of equal protection, finding no rational basis for GPTC's judgment to limit the debates to the major party candidates. Appendix at A-55.

On appeal to the United States Court of Appeals for the Eleventh Circuit, the District Court's grant of injunctive relief was vacated permanently with remand instructions that the complaint be dismissed. Appendix at A-11; *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 (11th Cir. 1990). The Court of Appeals correctly recognized that content based editorial decisions are an integral part of all programming decisions, and that the decision to air debates between front runners was just such a decision, but was not one which was viewpoint driven. Finding the decision to be rational, the Court of Appeals found neither First Amendment violations nor a denial of equal protection under the Fourteenth Amendment. Appendix at A-6 through A-7; 917 F.2d at 489. Petitioners filed a Petition for Rehearing and Suggestion of Rehearing En Banc which were denied March 1, 1991. Appendix at A-61.

SUMMARY OF ARGUMENT

This case presents a challenge to the editorial discretion of broadcasters licensed by the FCC to provide programming in the public interest, and organized to provide educational and public broadcasting. As a broadcast licensee, GPTC has discretion to make subjective judgments about its programming, and this discretion extends to the manner in which it covers political campaigns and the candidates themselves.

The fact that GPTC is a state entity does not diminish its ability to make editorial judgments. *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982) (en banc), *cert. den.* 460 U.S. 1023 (1983); *Schneider v. Indian River Community College Foundation*, 875 F.2d 1537 (11th Cir. 1989). Since GPTC's programming judgment to broadcast a debate between the front running candidates was not an effort to suppress speech because of opposition to the viewpoint of the Libertarian candidates, and since there was no "policy or practice of GPTC that 'pervasively "curtail[s] access to ideas" lending a constitutionally impermissible, discriminatory bias to the state's mission.' " *Schneider*, 875 F.2d at 1541. Petitioners were not subjected to a violation of their First Amendment rights.

Likewise, since Petitioners are not members of a protected class, and the broadcast judgment of GPTC was rational, the decision to air debates between the major party candidates without participation by the Libertarian candidates was not a denial of equal protection under the Fourteenth Amendment.

ARGUMENT

I. GPTC'S EXERCISE OF BROADCAST DISCRETION IN DECIDING TO AIR DEBATES BETWEEN FRONT RUNNING MAJOR PARTY CANDIDATES WAS NOT AN UNCONSTITUTIONAL RESTRICTION OF PETITIONERS' FIRST AMENDMENT RIGHTS.

A. GPTC'S BROADCAST OF THE DEBATES DID NOT CONSTITUTE A PUBLIC FORUM.

Contrary to Petitioners' claim, the Court of Appeals did not consider GPTC's broadcast *facilities* to be the relevant forum upon which to base its consideration of this case. Rather, the Court of Appeals considered GPTC's "communicative activity" to be the relevant forum, finding that activity not to be a "pure marketplace of ideas." Appendix at A-4 through A-5; 917 F.2d at 488. The clear import of the Court of Appeals' discussion was that the broadcast activity of airing the debates in the format devised by GPTC for the lieutenant gubernatorial debate and by the Atlanta Journal and Constitution for the gubernatorial debate, did not constitute a public forum. This correct determination is consistent with this Court's decision in *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*, 412 U.S. 94, 124 (1973), that no First Amendment public right of access to the television broadcast medium exists, even where access is sought for the purpose of disseminating views on public issues and matters of political interest. Moreover, other circuit courts of appeal have refused to recognize such an expanded right of access to the medium, either to demand a program be shown, that it not be shown, or that it include or exclude certain participants. *See generally, Muir v. Alabama*

Educational Television Commission, 688 F.2d 1033 (5th Cir. 1982) (en banc) *cert. den.*, 460 U.S. 1023 (1983); *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990); *Johnson v. Federal Communications Commission*, 829 F.2d 157 (D.C. Cir. 1987); *Kennedy for President Comm. v. Federal Communications Commission*, 636 F.2d 417 (D.C. Cir. 1980); *Belluso v. Turner Communications Corporation*, 633 F.2d 393 (5th Cir. 1980).

Thus, GPTC's broadcasting activity, given its statutory mission, does not constitute a public forum as claimed by the Petitioners. The programs at issue here are political debates, but they are merely one particular format of numerous programming possibilities from which GPTC, in its discretion, might have selected in providing coverage of the campaigns. The debates were not open invitations for general political discourse as Petitioners would have this Court believe.

B. GPTC'S DECISION WAS A RATIONAL EXERCISE OF ITS JOURNALISTIC DISCRETION.

This Court has held:

> Access to a non-public forum . . . can be restricted as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's views.

Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 800 (1985), quoting *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). Of course, Petitioners would impose a strict scrutiny – compelling state interest standard of review in this case. That level of

review would subject *all* programming decisions to judicial intervention, which is clearly contrary to the statutory scheme of the Federal Communications Act, and any reasoned approach to First Amendment application in the broadcast media.

The programming decision here was reasonable. It was determined that the major party candidates, who were by far the front runners in each of the two political races, were more newsworthy. Dr. Ottinger testified the debates would be more beneficial to the voters if limited to the major party candidates, permitting more focused examination of the issues. This is precisely the type of programming decision made by broadcasters on a daily basis. Programming requires a broadcaster to select what programs to air or what speakers to interview. The selection obviously excludes others from participation, and as long as the selection process is not an effort to suppress the view of others, no First Amendment violation occurs.

The record in this case is void of any evidence GPTC made its program choice in an effort to suppress the views of the Libertarian candidates. In fact, GPTC offered air time to both Petitioners, which was initially refused, but later accepted after the Court of Appeals' decision in this case.

Moreover, the record does not reveal any policy or practice of GPTC designed to "curtail access to ideas" or the positions of the Libertarian Party which would establish a "discriminatory bias" on the part of this broadcaster. *Muir*, 688 F.2d at 1053.

There being no effort on the part of GPTC to censor or otherwise prevent the dissemination of the viewpoints

of the Libertarian candidates, the Court of Appeals correctly found that Petitioners have not been subjected to any violation of their First Amendment freedoms of expression.

II. GPTC'S FAILURE TO INVITE THE LIBERTARIAN PARTY CANDIDATES DID NOT RESULT IN A DENIAL OF EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT.

The Court of Appeals found that the Petitioners, as political candidates, were not members of a protected class. Accordingly, the Court of Appeals found that the Respondents were required only to demonstrate that their decision to air debates without participation by the Libertarian candidates was rational, citing *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990). Finding the Respondents' decision to be rational, the Court of Appeals found no violation of the Equal Protection clause.

As an exercise of journalistic discretion, it is beyond question that GPTC's decision to air a more newsworthy program was a rational one. It was rational both for the purposes of First Amendment analysis as well as equal protection review. As indicated above, any programming judgment entails the selection of what programs will be aired or what persons will participate. This necessarily results in the exclusion of all others. The same dangers inherent in Petitioners' First Amendment claims exist with their equal protection arguments. Any programming decisions would be subject to judicial review on the naked assertion that the public broadcaster will air one perspective of an issue but not another. The obvious

result is that the beneficial activities of public broadcasting will be diminished to a cacophony of endless disorganized perspectives. This is inconsistent with the mission of GPTC and certainly is not required under the Equal Protection clause of the Fourteenth Amendment. Moreover, this result would reduce the regulatory scheme of the Federal Communications Act to a totally unacceptable level of ineffectiveness.

III. THE ISSUES RAISED IN PETITIONERS' COMPLAINT ARE NOW MOOT.

In *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), this Court noted that the:

> . . . case or controversy limitation serves "two complimentary" purposes. *Flast v. Cohen*, 392 U.S. 84, 95 (1968). It limits the business of federal courts to "questions presented in adversary context and in a form historically viewed as capable of resolution through the judicial process" and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude in the areas committed to the other branches of government." *Id.* Likewise, mootness has two aspects: "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Powell v. McCormick*, 395 U.S. 486, 496 (1969).

Id. at 395-96. *See also Murphy v. Hunt*, 455 U.S. 478 (1981). In order to avoid mootness there must be an actual controversy at all stages of the litigation. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1974); *Steffel v. Thompson*, 415 U.S. 452, 459, n.10 (1974); *Roe v. Wade*, 410 U.S. 113, 125 (1973).

In this case, the debates which form the subject matter of the Petitioners' complaint have already occurred. The issues raised by the Petitioners have been adjudicated by both a district court and the United States Court of Appeals for the Eleventh Circuit. At this point in time there is no "case" or "controversy" with respect to whether the Libertarian party candidates were constitutionally entitled to participate in the debates.

While these issues may be "capable of repetition" there is no "reasonable expectation" or "demonstrative probability" that the conditions bringing rise to the complaint in this action will recur. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1981). The doctrine of "capable of repetition yet evading review" simply does not apply in this case.

CONCLUSION

This case presents none of the special and important considerations favoring review by this Court on certiorari. Petitioners have pointed to no conflicting decisions of other United States Courts of Appeal and certainly have not illustrated that the United States Court of Appeals for the Eleventh Circuit has made a decision so far removed from normal judicial process as to demand an exercise of this Court's power. Moreover, Petitioners have not illustrated that the Court of Appeals' decision in this case conflicts in any way with applicable decisions of this Court. Supreme Court Rule 10.1(a)(b).

The opinion of the United States Court of Appeals for the Eleventh Circuit is imminently correct. That opinion allows for the proper exercise of editorial discretion in

performing programming for public television broadcasts consistent with state and federal statutory requirements.

For these reasons, these Respondents respectfully request that the Petition for Writ of Certiorari be denied, or in the alternative, that the opinion of the Court of Appeals be summarily affirmed.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

MICHAEL E. HOBBS 358200
Deputy Attorney General
Counsel of Record

Please Serve All
Communications On:

MICHAEL E. HOBBS
Deputy Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 651-9451